IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 22ND NOVEMBER 2007 / 1ST AGRAHAYANA 1929

CRL.A.No. 1643 of 2004(C)

SC.163/1998 of THE ADDITIONAL SESSIONS COURT FAST TRACK I (ADHOC), MANJERI
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APPELLANT: ACCUSED:

PUVANKARA KUNHI BAPPU, S/O. MOHAMMED,
PERUMPADAPPU AMSOM, CHERUVALLOOR DESOM.

BY ADV. SRI.M.K.DAMODARAN (SR.)
SRI.M.P.PRABHANANDAN

RESPONDENTS: COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NO.1643 OF 2004 ()

Dated this the 22nd day of November, 2007

J U D G M E N T

KOSHY,J.

The accused/appellant was sentenced to undego imprisonment for life and to pay a fine of Rs.10,000/- for offences punishable under Section 302 of the Indian Penal Code for murdering one Rasheed on 20.3.1997.

2. According to the prosecution, at about 7 p.m. On 20.3.1997, accused had repeatedly stabbed one Rasheed at Chiravallor – Changaramkulam public road due to his previous enmity. Deceased on receiving injury tried to ran away from the spot but the accused chased him with a knife in his hand and on his way he slipped and fell down on the road and at that point of time, accused had repeatedly directed stabs against him with knife. The deceased had resisted the blows but he had sustained injuries on his left hand and in the midst of his

struggling to save himself from the wrath of the accused, he had sustained a stab injury on his right thigh, which has ultimately resulted in his death at a hospital at Kunnamkulam. The alleged motive was that accused was annoyed due to the teasing of his wife by the deceased and there was an earlier dispute between them in the previous night and that accused was retaliating due to his previous enmity. The younger brother of the deceased, PW1 gave F.I.Statement without any delay. On getting telephonic information police arrived at the spot.

3. PW1 is the younger brother of the deceased who gave F.I.Statement. In the F.I.Statement, it is stated that while he was returning to his house after seeing volley ball match, he saw accused trying to stab his brother. His brother ran away. But he fell down. Then the accused went there and stabbed him. But that was resisted by the deceased with hands. Immediately accused again stabbed and had injured his right femur. His brother started running to his uncle's shop. Accused ran after him. By the time Kabir and Abdulla who were in the shop took him to the hospital. By the time, large number

of people gathered there. He also stated that at the time of incident, one Murali came. He was also injured. He later knew that his brother died at the hospital. He also stated that on 19.3.1997 at the same place, there was a push and pull occurred between accused and the deceased. Evidence of PW1 shows that he did not go to save the deceased and he did not take the deceased to the hospital. It is argued by the counsel for the accused that if he was anywhere near, he must have rushed to the spot and atleast he would have tried to save his brother. In F.I.Statement he stated that in the very same incident, one Murali interfered and Murali was not examined and in his deposition in chief, he did not say anything about the injury that occurred to Murali and that part was marked as Ext.D1(a). He gave the F.I.Statement at 9.30 p.m. after the death of the deceased and police came to the place of occurrence and statement was given by PW1. Apart from the evidence of PW1, PW9 who is the brother-in-law of the deceased also gave similar evidence. But PW8 and other independent witnesses were declared hostile It is stated that large number of people gathered immediately. But none of them were examined.

4. Now we will come to the defence of the accused in 313 statement. According to him, at the time of incident, he was passing through the road in a bicycle and deceased Rasheed and a group of 10 people had prevented and restrained him at the spot of incident. Then the deceased took a packet of chilly powder out of his pocket and sprinkled in his face. On receiving the chilly powder he was unable to move. At that time, he was being dragged through the road and the group of people has assaulted him and he had sustained injury on his chest. He has directly gone to the hospital and got admitted. Around 10 p.m he came to know about the death of the deceased. He also stated that the accused used to teasing his wife and he used to spit looking at his face. The motive as contended by the prosecution was evident from 313 statement. It is noted that in the course of incident accused was also injured. Ext.D5 is the wound certificate of the accused. Following are the injuries shows in the wound certificate:

1. Multiple linear abrasions vital 6" to 8" left side of the front of chest.

2. Linear abrasion 8" on length Rt.Side of the chest.

3. Multiple linear abrasion 10" cm length just front of fore arm.

The cause of injury is stated as follows:

The Doctor also stated that injury can be caused as informed. We also note that the prosecution suppressed the injury on A1. If the evidence of PW1 and PW8 are believed there is no reason for causing injury on the accused. Therefore it is contended that prosecution has not narrated the correct case. But the injuries on the accused are minor and because of non-explanation of injuries on the accused, entire case cannot be ruled out. But at the same time, from the scene of occurrence chilly powder was found out as can be seen from the scene mahazar (Ext.P3) and definite case of the accused was that deceased and group of people threw chilly powder on him and attacked and that shows that the defence of the accused is a probable one.

5. Now we will come to the post mortem certificate. The Ante-mortem injuries as reported in Ext.P8 shows that there were two injuries which are follows:

> Injuries (Ante-mortem):
>
> 1. Incised wound 2 x 0.2 cm on the medial aspect of left hand 8 cm below wrist.
>
> 2. Incised punctured wound 2.9 x 0.6 cm on the medial aspect of right thigh obliquely placed with its upper end 18 cm below the iliac crest and lower end 29 cm above knee. Both ends of the wound were sharply cut. The wound had cut cleanly the quadriceps muscles underneath. The femoral artery was found cleanly severed. The wound had a total depth of 10 cm.

According to the post mortem report, it is stated that deceased died due to injury sustained to right thigh involving femoral artery. It is not stated that the injury is likely to cause death in the ordinary course. But the doctor during cross examination stated that Laymen may not be knowing the nature of artery cut. He also stated that bleeding cannot be stopped by bandage and operation had to be done. He also stated that

injury No.1 could be caused by an accidental contact. In this connection, we also refer to Ext.P2 wound certificate issued by PW2 doctor. In the wound certificate following injuries were noted:

> "Blood stains all over the body pupil reacts shiggishly. 3 cm long 1 cm wide incised penetrating wound over antenomedial aspect of (R) thigh 9 inches below the anterior superior iliac spine $1^{1}/_{2}$ cm long skin deep incised wound over medial aspect of left palm. No active bleeding from either of the wounds."

PW2 doctor stated that both injuries were simple injuries. He deposed that there was incised penetrating wound over medial aspect of left palm and antenomedial aspect of (R) thigh. Name of the assailant was not disclosed. Both the injuries were simple in nature. According to him, accidental contact with sharp edged object is sufficient to cause these injuries. At the time of examination of PW2 he was not aware whether artery was cut. But that was revealed only at the time of post mortem. Evidence would clearly shows that even if PW1 is believed, there was Murali, PW1, PW9 and deceased on the one side and accused, Shaji etc. may be on the other side. The

wound certificate of the accused also stated that he was attacked by 5 to 6 people. A counter case also registered by the deceased party. Accused was also injured. It is also argued by the prosecutor that on the basis of the confession statement the knife was recovered from the compound wall of the accused. The person who recorded the confession statement, the Circle Inspector of Police who recorded the statement, was not examined as he was in America at the time of trial. But at the maximum we can come to the conclusion that the fatal injury was inflicted by the accused. Presence of chilly powder, injury on the accused, non explanation of the injury on the accused by prosecution witnesses, motive suggested by the prosecution etc. show that private defence pleaded by the accused is a probable one. It is true that burden is on the accused to prove the defence. But unlike the duty of the prosecution to prove the charges beyond reasonable doubt, private defence need be proved by preponderance of probability (***See V. Subramani and another v. State of Tamil Nadu (2005 AIR SCW 1311***). But he has exceeded the right of private defence. But it is come out in evidence that there was a fight between the two

and accused was also injured. The injury on the deceased is not on the vital part of the body but only on the leg. Unfortunately artery was cut. The doctor who issued the wound certificate stated that injuries were simple in nature and doctor also stated that laymen cannot understand the nature of artery cut. In these circumstances, we are of the opinion that the accused can be convicted only under Section 304 Part II and not Section 302 of IPC. Hence we set aside the conviction and sentence under Section 302 of IPC and we convict the appellant under Section 304 Part II and sentence him to undergo rigorous imprisonment for five years. He is also entitled to the right of set off. Appeal is allowed to the above extent.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

M.F.A.NO. OF 2006 ()

J U D G M E N T

1st November, 2007